In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-461

ALECK ALEXANDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 500 F. 2d 1. The memorandum and order of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1974. The petition for a writ of certiorari was filed on October 21, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the compensation program for officers in the Public Health Service is the exclusive remedy for injuries inflicted on such officers by governmental negligence.

2. Whether, in any event, the Federal Tort Claims Act provides a remedy for a commissioned officer of the Public Health Service who incurs a duty-connected injury.

STATEMENT

Petitioner Alexander, a commissioned officer of the Public Health Service (the Service), underwent elective surgery at a military hospital for removal of his gall bladder. He was entitled to such free medical care as a member of the "uniformed services," as defined in 10 U.S.C. 1072(1).[1]

During the course of the operation, an anesthesiologist's tube placed in petitioner's trachea malfunctioned, because of either improper insertion or inadequate monitoring by the supervisory personnel. As a result, petitioner suffered numerous physical infirmities, including temporary blindness and paralysis, residual uncoordination of the feet and upper extremities, and permanently defective vision.

Due to these injuries petitioner was rated completely disabled and placed on temporary disability retirement status for a period of approximately two and one-half years, pursuant to the procedures specified in 10 U.S.C. 1201 and 1202. During that time he was paid disability compensation in excess of $44,000 under the Career Compensation Act.[2] On August 6, 1972, Alexander was recalled to active duty with the Service as provided in 10 U.S.C. 1210 and 1211.

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[1]10 U.S.C. 1072(1) provides:

> "Uniformed services" means the armed forces and the Commissioned Corps of the Environmental Science Services Administration and of the Public Health Service.

[2]See 10 U.S.C. 1202, 1401, 42 U.S.C. 213a.

Petitioner filed this suit under the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671-2680, to recover damages for the alleged negligence of the doctors and other medical personnel who had participated in his anesthetization. The district court found that petitioner "in March 1968 [the month of his operation] was generally on active duty * * * with the United States Public Health Service and as such was entitled to medical, surgical, and hospital care by the United States" (App. 26).[3] The district court held, however, that petitioner was entitled to recover because his "injury-causing accident * * * had nothing to do with the * * * career of the plaintiff * * * involved" (App. 19). Accordingly, finding government negligence, the district court entered judgment in favor of petitioner (App. 16-37, 46-50).

The court of appeals reversed, holding that petitioner's suit should be dismissed on the basis of the principles established in *United States* v. *Demko*, 385 U.S. 149 (Pet. App. A4-A5):

> [W]e believe that the rationale of exclusivity that the Supreme Court expressed in *Demko* is fully applicable to this case. Because Alexander was covered by a comprehensive compensatory plan at the time of his injury, we hold that his tort recovery was improper. By permitting him to recover, the trial court in effect granted Alexander greater rights than government employees, prisoners, or members of the armed forces.

The court of appeals also held, as an independent basis for reversal, that petitioner's suit was barred by *Feres* v. *United States*, 340 U.S. 135, since "the analogy between *Feres* and the present case is so close that it compels the same result" (Pet. App. A5).

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[3] "App." refers to the Appendix in the court of appeals.

ARGUMENT

The court of appeals' decision rests on two independent grounds, each sufficient to support the outcome. Each of the grounds is correct, and there is no conflict among the circuits. Moreover, the decision is of limited importance since, to our knowledge, this is the first suit ever brought by a Public Health Service Officer under the Federal Tort Claims Act to recover damages for an injury for which he was compensated under the Career Compensation Act.[4] Accordingly, further review by this Court is not warranted.

1. This Court has repeatedly held that federal employees whose injuries are compensable under a comprehensive statutory compensation scheme may not bring a suit under the Federal Tort Claims Act. *United States* v. *Demko*, *supra*; *Patterson* v. *United States*, 359 U.S. 495; *Johansen* v. *United States*, 343 U.S. 427. Such a comprehensive program covers commissioned officers of the Public Health Service. Full medical care is provided at no cost, and disabled officers are entitled, for the duration of any disability, to payments taking the place of employment income.[5]

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[4]One similar suit has been filed subsequently, *Bumberg* v. *United States*, No. 72-3721-T (D. Mass.) (pending).

[5]The court of appeals here held that petitioner "was covered by a comprehensive compensatory plan at the time of his injury" (Pet. App. A4-A5). The fact that in the instant case the applicable statute provided petitioner "temporary" compensation is of course appropriate to his temporary inability to serve on active duty. Moreover, petitioner remains eligible for continuing medical treatment under 10 U.S.C. 1071, and for all other benefits available to service commissioned officers under 42 U.S.C. 213a. If petitioner had not qualified for reactivation, which he vigorously and persistently sought, he would have been eligible for "permanent" benefits. See 10 U.S.C. 1210. During the two and one-half year period of his temporary disability, he received seventy-five per cent of his basic pay. Petitioner does not allege that the statutory program is insufficiently comprehensive.

Petitioner's primary argument is that the statutory compensation remedies in those cases were exclusive only because the statutes expressly so provided (Pet. 8-9, 10). This contention is incorrect. In *Demko*, *supra*, the compensation program for federal prisoners was silent on whether other federal remedies were excluded. This Court, reasoning that compensation programs traditionally were substitutes for—not complements to—tort remedies, held that "where there is a compensation statute that reasonably and fairly covers a particular group of workers, it presumably is the exclusive remedy to protect that group." 385 U.S. at 152. The other cases are to the same effect. Statutory silence indicates that the remedy is exlusive and therefore excludes a Tort Claims Act remedy.

Moreover, allowing petitioner's action for damages under the Tort Claims Act would create the anomaly that members of the Commissioned Corps would be the only federal employees who would have that election of remedies, "a congressional purpose not easy to infer." *Demko*, *supra*, 385 U.S. at 152.[6]

2. Because the court of appeals correctly decided that petitioner's statutory compensation program precluded a Tort Claims Act suit, there is no need to consider that court's second holding—that petitioner's suit was also barred by the rationale of *Feres* v. *United States*, 340 U.S. 135.

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[6]Contrary to petitioner's contention (Pet. 9), the receipt by federal judges of *retirement* benefits would certainly not preclude suit under the Federal Tort Claims Act.

Commissioned officers of the Service are covered by the same compensation system that applies to members of the armed services. Moreover, as the court of appeals pointed out, "the relevant conditions of service in the Public Health Service are very similar to those in the armed forces and demonstrate an equally special relationship and need for discipline" (Pet. App. A6). "These similarities to military service illustrate how the concern voiced in *Feres* regarding the effect of tort suits on discipline and internal structure apply with equal force to the Public Health Service" (*ibid.*).

Feres bars Tort Claims Act suits for injuries occurring during or because of military service. The question in this case is whether medical malpractice in elective surgery performed while the officer is on sick leave is sufficiently service related. We submit that it is. In *Feres* itself two of the plaintiffs sought recovery for medical malpractice committed in military hospitals. The courts of appeals consistently have held that malpractice committed upon a serviceman during elective surgery in a military hospital is "incident to service" even though, as here, he was on leave at the time he was admitted. See *Shults* v. *United States*, 421 F. 2d 170 (C.A. 5);[7]

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[7]In *Shults*, *supra*, 421 F. 2d at 171-172, the court held:

> It is true that Shults was injured while on leave and that the leave was never formally cancelled prior to his death. Nevertheless, it is obvious that the injured man could not have been admitted, and would not have been admitted, to the Naval Hospital except for his military status. He was there treated by Naval medical personnel solely because of that status. It inescapably follows that whatever happened to him in that hospital and during the course of that treatment had to be "in the course of activity incident to service."

Lowe v. *United States*, 440 F. 2d 452 (C.A. 5), certiorari denied, 404 U.S. 833. Such medical malpractice is related to petitioner's service because it was only as part of that ongoing service that petitioner was entitled to free treatment in a military hospital.

United States v. *Brown*, 348 U.S. 110, and *Brooks* v. *United States*, 337 U.S. 49, do not indicate a contrary result. In *Brown* the Court allowed an action under the Tort Claims Act by a veteran who was neither an employee nor a soldier at the time of his alleged injury. *Brown* reasoned that Brown's claim was "not foreign to the broad pattern of liability which the United States undertook by the Tort Claims Act." 348 U.S. at 112. But petitioner here was injured while on active duty, as the district court found (App. 26).[8] Because petitioner was on active duty, and since his injury arose out of treatment to which he was entitled only by reason of his active duty status, the rationale of *Feres* precludes Tort Claims Act recovery.

In *Brooks* servicemen were allowed to sue under the Tort Claims Act for injuries occurring on furlough and which "had nothing to do with the Brooks' army career."

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[8]Indeed, petitioner was continued in active duty status until January 31, 1969, ten months after his injury. Active duty status denotes more than mere eligibility for medical benefits; 42 C.F.R. 21.91 provides that even sick leave is a type of active duty status, in which the officer is fully subject to command by and supervision of his superiors in the Service.

337 U.S. at 52. The two Brooks brothers had been injured in a collision with a government truck; the injury was not related to their service.[9]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[9]The decision accords with the general law of employment compensation plans: an employee who is injured outside the scope of his employment, and thus outside the employer-employee relationship, is not covered by the plan, 1 Larson, *Workmen's Compensation Law*, §6.10 (1972), and therefore is entitled to seek a remedy in tort. See *United States* v. *Demko*, *supra*, 385 U.S. at 152.